

American Arbitration Association

ATTACHMENT NO. 2

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

AMERICAN FEDERATION OF TELEVISION AND
RADIO ARTISTS - PITTSBURGH (AFTRA)

IN THE MATTER OF THE ARBITRATION

Between

AMERICAN FEDERATION OF
TELEVISION AND RADIO
ARTISTS - PITTSBURGH (AFTRA)

and

EZ COMMUNICATIONS, INC.
WBZZ-FM

) OPINION AND AWARD
)
)
)

) RONALD F. TALARICO
) ARBITRATOR
)
)

) AMERICAN ARBITRATION ASSOC.
) CASE NUMBER: 55-300-0064-88
)

GRIEVANT

ELIZABETH RANDOLPH

ISSUE

PAYMENT OF SEVERANCE BENEFITS

HEARING

August 19, 1988
Pittsburgh, Pennsylvania

BRIEFS SUBMITTED

November 2, 1988

APPEARANCES

For the Union

Samuel P. Kamin, Esquire
Terry L. Jordan, Esquire

For the Employer

Stephen H. Jordan, Esquire

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esquire, was mutually selected by the parties from a list supplied by the American Arbitration Association to hear and determine the issues herein. A hearing was held in Pittsburgh, Pennsylvania, on August 19, 1988, at which time the parties were given an opportunity to introduce documentary evidence and to examine and cross examine witnesses. Post-Hearing Briefs were submitted by both parties on November 2, 1988, at which time the record was closed. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

SCHEDULE 1 - ANNOUNCERS

* * *

B. Staff Working Conditions

* * *

7. The following provisions shall govern severance: each announcer shall receive a minimum of four weeks notice of termination of employment or four weeks salary in lieu of such notice. In addition, the following severance schedule shall apply:

3 - 6 months	2 weeks
6 - 12 months	4 weeks
1 - 2 years	6 weeks
2 - 3 years	8 weeks

Then one additional week's severance for each year of service. All payments in payments in lieu of notice, severance pay, accumulated holiday or vacation pay shall be paid at the staff

announcer' s personal agreement rate is such announcer has a personal agreement calling for a salary higher than the minimum salaries herein.

The Company may discharge staff announcers without notice or termination pay for . flagrant neglect of duty, drunkenness, dishonesty or other serious cause. Any staff announcer whose employment is terminated shall be entitled to payment for any compensating days off which he may have earned and not received.

* * *

16. Equal Opportunity

Both parties hereto affirm their intentions to continue to adhere to and support a policy which affords equal opportunity to qualified individuals regardless of their race, creed, color, national origin, age or sex.

BACKGROUND

The Employer, EZ Communications, Inc., owns and operates WBZZ, a Pittsburgh FM radio station, with offices located at 1715 Grandview Avenue, Pittsburgh, PA 15211. The grievant, Liz Randolph, has been employed by the Company since 1985 as its news director. Her duties include gathering and writing news, screening mail, taping the overnight news, dubbing a program called "Earth News", taping miscellaneous interviews and research. In addition, she also reads the news twice each hour during a morning radio show called "The Quinn and Banana Show", which features radio personalities Jim Quinn and Don Jefferson.

It has become common practice in today's radio industry for the newsperson, weather reporter, and even traffic reporter to engage in "banter" with the disc jockeys rather than just giving their various reports. The grievant alleges that, on a number of occasions, Quinn and Banana made lewd and derogatory comments about her during their radio program to the effect that she was sexually promiscuous, thereby causing her reputation to suffer in the Communications Industry and causing her emotional and physical pain and suffering.

The grievant's unrebutted testimony was that these comments first began in February, 1986 while she was on vacation on a Caribbean Cruise. Quinn and Banana stated during their program that she was on the "Love Bloat" and that she was having promiscuous sex with various people on the cruise ship. Apparently these and similar comments were made the entire time she was on vacation as an on-going topic for their brand of "humor". The grievant testified that upon return from vacation she called the Program Director at the radio station and told him she was upset over these outrageous and malicious statements. The grievant also indicated that she told the two disc jockeys of her anger at their statements.

The next on-the-air comments occurred in July, 1986 while the grievant was vacationing in Cape Cod, Massachusetts. The grievant testified that upon her return, she heard from various friends who had listened to "The Quinn and Banana Show" that they indicated she was having sex with various people in Cape Cod.

The grievant stated that she suffered a severe panic attack due to these comments and was taken to the hospital for tests. On-the-air comments, such as the following, apparently continued on a steady basis from July of 1986 to January of 1988, "suggesting" that she was a promiscuous person, that she had oral sex and intercourse with large numbers of people, that she was mentally unstable and had sexually transmitted diseases, that she was having sex with a number of the Pittsburgh Penguins as well as members of the U.S. Marine Corps, and the fact that she knows the hotline numbers for the Center for Disease Control by heart.

These comments/jokes apparently reached a breaking point for the grievant on January 22, 1988, during the "Friday Morning Joke-Off". This is a regular feature of the Quinn and Banana Show and is identified over the air as being a joke. During that segment of the program, a disc jockey from a station affiliated with WBZZ called in with a joke which used the grievant as the subject matter. His joke was recorded and then later broadcast during the "Joke-Off". It was not a spontaneous call from the audience, as the majority of the jokes are. The joke went as follows:

"My wife goes to the same hairdresser that Liz Randolph goes to."

"Oh, she does?"

"Yeah, she does."

"Did you know that Liz Randolph has a tattoo on her forehead?"

"Oh yeah, what does it say?"

"It says, 'Let go of my ears, I'm doing the best I can.'"

There is no question that this "joke" alludes to the performance of oral sex.

The grievant did not actually hear the joke as it was originally broadcast. Rather, one of the disc jockeys played a tape of it for her shortly afterwards, just several minutes before she was to read the news. Upon hearing the "joke", the grievant became extremely distraught and began shaking. She testified that she became so emotionally devastated and humiliated that she could not go on the air. She went looking for the program director but he had yet to arrive, so she left the station shortly thereafter. When the general manager, Mr. Tex Meyer, arrived a few minutes later, he heard bits and pieces of what had occurred and immediately began an investigation. He pulled Quinn and Banana off the air and met with them as well as his program director. Another disc jockey was brought in to finish their show. The grievant's two remaining news casts that morning were not aired. As soon as the grievant got home, she called the station and attempted to contact the program director but he was not available. The grievant returned later that day to the station and wanted to resume her work. However, because of what had transpired, she was placed on leave of absence with pay until an investigation could be completed.

On January 27, 1988, a meeting was held with all parties. The grievant's employment was terminated on January 29, 1988, for

flagrant neglect of duty. Her subsequent claim for severance pay was denied based upon the forfeiture language contained in Article 7 of Schedule I, thus giving rise to the within grievance.

ISSUE

Whether the actions of the grievant in leaving the radio station premises without completing her assigned duties constituted a flagrant neglect of duty which authorized the Company to withhold payment of severance pay?

POSITION OF THE EMPLOYER

It is a well settled principle of Arbitration Law that an employee who is confronted with a situation in his/her working environment which he/she believes to constitute a violation of the Collective Bargaining Agreement, is required to carry out his/her work assignment and to turn to the grievance procedure for relief, rather than engaging in self help by walking off the job. Arbitrators have recognized that resorting to self help may be justified where adherence to work orders would result in a serious health hazard. The grievant made an obvious attempt to fit within the very narrow exception to the rule of perform now and grieve by offering the testimony of David B. Orbison, Ph.D. However, Dr. Orbison's testimony is highly questionable. First, he stated that he could not make a diagnosis of the grievant's condition. Second, the grievant had been treating with a

psychiatrist for quite some time and Dr. Orbison never contacted him before issuing a report. Moreover, the psychiatrist, was not called to testify. The only information utilized by Dr. Orbison was transmitted to him by the grievant in a two hour interview "from her perspective". Dr. Orbison reviewed no medical records whatsoever. Finally, Dr. Orbison admitted that a diagnosis of a

making. The exception usually occurs when an Employer issues a directive to an employee which the employee believes would lead to a serious health hazard. The employee then, on the spur of the moment, refuses. In this matter, the grievant alleges violations of her rights causing emotional and physical harm dating back to February, 1986. The grievant had a 23 month period within which to file a formal grievance and have the matter resolved. She did not. Therefore, the grievant was not out of the blue placed in the position of fear for her physical well-being which caused her to bolt from her duty station.

Finally, the grievant is involved in the entertainment business. The grievant is part of the entertainment vehicle and is involved in the interplay with the other on-air talent. The grievant knew of and accepted this role as evidenced by her testimony that in the past she willingly engaged in this banter, that at one time she showed up at the station in a very revealing outfit, and often made suggestions that she wanted to be nude. Thus, the instant dispute should be viewed in a context which differs substantially from the normal industrial work place environment.

POSITION OF THE UNION

The burden of proof is upon the Employer to establish that the grievant was terminated due to a flagrant neglect of duty. The only witness for the Employer was the general manager, Tex Meyer, whose explanation of the reason for the discharge falls

far short of this heavy burden. Even if the Employer is believed to have met its burden, there is no question that the grievant's position must prevail due to the unconscionable, reckless, malicious, intolerable and outrageous actions towards the grievant which forced her actions of January 22, 1988. These actions were communications uttered to the hundreds of thousands of listeners of WBZZ and implied that the grievant had engaged in indiscriminate oral sex with large numbers of persons; that she is promiscuous; has sexually transmittable diseases; and is an otherwise loose woman. The grievant testified that she forcefully communicated to the disc jockeys, to her program director and others of the terrible health consequences which these statements were causing her. Dr. David Orbison testified on behalf of the grievant that in his expert opinion that due to the outrageous actions of Quinn and Banana over the two year period from February 1986 to January 1988, she was experiencing an increasing deterioration in her self-esteem, that these actions caused her to suffer panic attacks and these panic attacks rendered her unable to perform her duties at WBZZ. The grievant's leaving the station on January 22, 1988, was caused by the malicious, unconscionable and outrageous actions of WBZZ's employees. It is difficult to imagine a more outrageous case of inhumane treatment towards an individual.

FINDINGS AND DISCUSSION

Because of the unique nature of the radio entertainment business and its dependency on ratings, the Employer must be accorded wide latitude in being able to change on short notice the format of its programming as well as accompanying personnel in an effort to find a larger audience. Because of this, the Collective Bargaining Agreement permits the "termination" of announcers on a non-cause basis. In exchange for this ability to make personnel changes, the Employer has agreed to provide a minimum number of weeks of notice or the corresponding salary in lieu of such notice. However, an exception exists to this severance notice/pay in situations where the employee is guilty of flagrant neglect of duty, drunkenness, dishonesty or other serious cause. Under these circumstances, a staff announcer's employment may be terminated without the severance notice/pay.

The precipitating event in the within grievance was Ms. Randolph's leaving the radio station on the morning of January 22, 1988, without completing her final two on-air news reporting segments as well as other miscellaneous duties required that day. Arbitral law abhors such self help on the part of employees and dictates that under most circumstances, any dispute or disagreement an employee might have with his employer is to be processed through the grievance procedure. The obvious purpose of this rule is to prevent an employee's rash action from disrupting the Employer's business. Therefore, unless the grievant can prove the existence of some justifiable or

mitigating circumstances that would permit her to avoid using the grievance process and resort to self-help by walking off the job, the Employer will have sustained its burden of proving that her actions were, in fact, a flagrant neglect of duty.

Arbitrators often deny or limit requested relief, notwithstanding the merits of the original complaint, where the grievant has resorted to self-help rather than to the grievance procedure. An important exception to the general rule of "obey and grieve" exists where obedience to orders would involve an unusual health hazard or similar sacrifice. However, such exceptions are viewed quite narrowly and must be supported by clear and convincing evidence. The Employer has raised some substantial questions as to the existence of this health hazard exception offered by the grievant. However, other possible exceptions to the duty to obey orders exist under circumstances where the order commands the performance of an immoral act, or would humiliate the employee or invade some personal right which is considered inviolable. Therefore, let us closely examine the events that transpired within to determine whether such an exception exists.

I agree with the argument put forth by the Employer that the individuals involved in this grievance are in the entertainment business, which differs considerably from the normal industrial work environment. It is also clear that the grievant was required to be involved in banter and interplay with the other on-air talent. I believe that the grievant knew of and accepted

the fact that she must participate to some degree in this type of arrangement. The evidence also reflects that the grievant willingly participated in the "banter" at various times even to the degree that during the program on Halloween she wore a revealing/risque costume to work.

However, I find that the banter/interplay the grievant was subjected to (as detailed in the Background section of this opinion) goes well beyond anything that could even remotely be considered part of one's job requirement. The jokes and suggestive remarks that were directed to her were lewd, offensive, sophomoric, in bad taste and beyond anything that an employee should have to be subjected to--even if they are part of an "entertainment vehicle". Fortunately or unfortunately (depending on one's perspective) the First Amendment protects such forms of expression from censorship. Constitutional protections, however, do not mean that an individual of reasonable sensibilities must be unwillingly bombarded or subjected to such forms of free speech, at least not as a mandated job requirement or within the confines of one's work environment. I find a parallel exists in this situation with circumstances that precipitated and are now governed by the Federal Government's Sexual Harassment Laws. An employee no longer has to put up with a hostile work environment that is created on the basis of sex, be it in the form of jokes, comments, suggestions, touching, etc.

I am sure that on the occasions the grievant willingly

participated in some mild risque bantering, she did so either because she wanted to or, as is more often the case, because she wanted to fit in and go along with the crowd. Such participation, however, in no way waives her right to object to the extremely outrageous remarks publicly directed to her nor makes her fair game for such insults. One must keep in mind these comments were not just made around the office or shop floor, as is normally the case. They were publicly broadcast to the thousands of people who listen to "The Quinn and Banana Show". The Employer argues that the highly suggestive remarks of the disc jockeys continued for quite some time, so one must question why the need for self-help arose at this point and why a grievance was not filed earlier. I believe one very plausible explanation exists, i.e., the vile and filthy joke perpetrated upon the grievant on January 22, 1988, was, in fact, the straw that broke the camel's back.

There is no question, under these circumstances, that the grievant's action of walking off the job was not only understandable, but more importantly, was justifiable. The conduct on the part of the disc jockeys was degrading, humiliating and a serious invasion of her personal rights and dignity. I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance. These circumstances are a narrow exception to the self-help rule and justify the grievant's actions.

Finally, I believe that the Employer was aware of or at least strongly suspected the grievant's negative reaction to these on-going lewd comments because of the general manager's reaction to the situation on the morning of January 22, 1988. When arriving at the station and learning that the grievant walked off in anger, the general manager did something I view as extremely drastic and unusual. He immediately pulled the two disc jockeys off the air. I find it very strange that he would abruptly stop an on-going program over an incident that the audience was certainly not aware of, and under circumstances where his investigation could have waited until the program was over. In fact, by abruptly stopping the program, the general manager is certainly sending a message to the audience that something was wrong, under circumstances where there was no immediate need to even hint that trouble existed. This implies to me that he knew of the on-going seriousness of the situation and the tension between the grievant and the disc jockeys, and he realized the time had finally come when the straw broke the camel's back.

AWARD

The grievance is sustained. The grievant is to receive payment for all severance benefits to which she is entitled together with interest at the rate of 6% per annum from February 5, 1988.

DATE: Nov. 16, 1988
Pittsburgh, Pennsylvania



Ronald F. Talarico
Arbitrator

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EZ COMMUNICATIONS, INC.,)	
WBZZ-FM,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action 88-2636
)	
AMERICAN FEDERATION OF)	
TELEVISION AND RADIO)	
ARTISTS,)	
)	
Defendant.)	

OPINION

ZIEGLER, District Judge

EZ Communication, Inc., WBZZ-FM brings this action pursuant to Section 301 of the Labor Management Relations Act, as amended, 29 U.S.C. § 185, to vacate the award of an arbitrator that granted severance pay to Elizabeth Randolph, a former news director at WBZZ-FM, the radio station owned and operated by EZ Communications. See Plaintiff's Exhibit E. The American Federation of Television and Radio Artists, a labor organization and party to a collective bargaining agreement with EZ Communications, represented Randolph in her claim for severance pay.

Randolph was employed by plaintiff as a news director for WBZZ-FM from 1985 until January, 1988. Her duties included reading the news twice during each hour of "The Quinn and Banana Show," a morning radio show featuring disc jockeys and local radio personalities, Jim Quinn and "Banana" Don Jefferson. It

is common practice for disc jockeys to engage in humorous exchanges with various reporters on the shows and Quinn and Banana often joked with Randolph while on the air. However, in 1986, Quinn and Banana began to recite tasteless, sexual quips about Randolph on the air while she was on vacation. The statements suggested that Randolph was sexually promiscuous and that she had sexually transmitted diseases, albeit in a joking manner.

As a result of the outrageous jokes directed at her, Randolph experienced anxiety attacks, difficulties in functioning on the air and working with Quinn and Banana in general. She was eventually admitted to a hospital due to the emotional trauma she suffered as a result of the ridicule. Thereafter, the on-the-air joking included jokes concerning Randolph's mental status, suggesting that she was instable, in addition to suggestions that she was sexually indiscriminate.

Attempts by Randolph to bring this shoddy treatment to an end by discussing her displeasure with superiors at the station were ineffective. Finally, on January 22, 1988, during the "Friday Morning Joke-Off" segment of the "Quinn and Banana Show," a disc jockey from a sister station to WBZZ-FM in St. Louis, Missouri, called the station on the air and made Randolph the butt of his joke, which referred to oral sexual activity in an offensive manner. The joke was played back for Randolph by Quinn or Banana just before she was to do a news report on their

show. Randolph became too distraught to perform and left the station.

Later that day, Randolph returned to the station to resume her news duties, but she was placed on leave of absence pending an investigation. One week later, Randolph's employment was terminated for flagrant neglect of duty related to her sudden departure from the station on January 22, 1988. As a result of her termination for what plaintiff alleges to be just cause under the collective bargaining agreement, plaintiff denied the claim of Randolph for severance pay.

Presently before the court are the cross motions of the parties for summary judgment. EZ Communications contends that the arbitrator exceeded his authority in numerous respects. Defendant disagrees. In keeping with well established principles of federal labor law, the arbitrator's award must be sustained so long as it "draws its essence from the collective bargaining agreement." Graphic Arts International Union v. Haddon Craftsman, 796 F.2d 692, 694 (3d Cir. 1986).

The arbitrator interpreted the relevant portions of the collective bargaining agreement as an agreement by the employer to pay announcers severance pay unless the employee is guilty of "flagrant neglect of duty, drunkenness, dishonesty or other serious cause." Plaintiff's Exhibit E at 10; Plaintiff's Exhibit A, Schedule 1, B. Staff Working Conditions at ¶ 7.

EZ Communications does not dispute the interpretation of the agreement in this regard. Rather, plaintiff asserts that

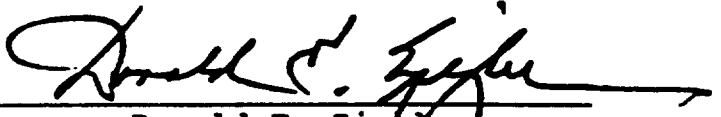
Randolph is not entitled to severance pay because the act of leaving the premises of WBZZ-FM on January 22, 1988, without performing newscasts, constituted a flagrant neglect of her duties and that, if she felt that she was being subjected to sexual harassment on the job, she was required to file a formal grievance rather than resort to self help by walking off the job.

The arbitrator disagreed with plaintiffs' characterization of Randolph's conduct on January 22, 1988, for which she was terminated. He found that " . . . the vile and filthy joke perpetrated upon the grievant on January 22, 1988, was, in fact, the straw that broke the camel's back." Plaintiff's Exhibit E at 13. The arbitrator further found that the employer was aware or at least strongly suspected that Randolph was offended by the on-air jokes made by Quinn and Banana at her expense. Plaintiff's Exhibit E at 14. The arbitrator concluded that " . . . the grievant's action of

Postal Service v. National Association of Letter Carriers, 839
F.2d 146 (3d Cir. 1988). The motion of plaintiff for summary
judgment will be denied, and defendant's motion will be granted.

A written order will follow.

DATED: October 16, 1989


Donald E. Ziegler
United States District Judge

cc: Counsel of record.

IT IS FURTHER ORDERED that the motion of defendant for

IN THE

RECORD

Court of Common Pleas

FEB 14 2:5

OF THE

COUNTY OF ALLEGHENY, PA.

COURT OF
ALLEGHENY

- Civil Division -

FILED
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PROTHOTARY
ALLEGHENY COUNTY

Elizabeth Nelson Randolph
a/k/a Liz Randolph

No. YS88-0273Issue No. 137387Judge John L. MunCourt Reporter Debbie

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Donald Jefferson, a/k/a Banana Dan, Jr.
Quinn, E.Z. Communications, Inc. a Corpor

VERDICT

AND NOW, to-wit, this 14th day of February, 1990, the Jury en
the above entitled case, finds for the Plaintiff on all three (3) counts
defamation, intentional infliction of emotional distress
invasion of privacy. We the jury award to the Plaintiff
for Compensatory Damages total of \$162,500.00 and (P
damages) total of \$487,500.00. In addition, we give
the Plaintiff \$13,500.00 lost wages and \$30,704.00
medical expenses).

Total 694,204.00Stephen Bauer

FOR COURT USE ONLY

Date Jury Sworn

Verdict Time